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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. ~~[illegible]~~ 49

MORTON SALT COMPANY,
a Corporation of Illinois,
Petitioner,

vs.

THE G. S. SUPPIGER COMPANY,
a Corporation of Delaware,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

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Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Morton Salt Company, prays for a review on a writ of certiorari, of a decree of the United States Circuit Court of Appeals for the Seventh Circuit. The opinion of said Court was filed January 14, 1941 (R. 124), in a case entitled *"The G. S. Suppiger Company, Plaintiff-Appellant* v. *Morton Salt Company, Defendant-Appellee"*. Said opinion is reported as yet only in 48 USPQ, 277. A petition for rehearing was denied

March 11, 1941, which is the date of the decree to be reviewed (R. 157). The mandate of said Court was stayed for thirty days to permit application for certiorari to this Court (R. 159).

Ten (10) copies of the record, one of which is certified (R. 161), printed for use in the court below, together with the proceedings and opinion in that court, are furnished herewith in accordance with Rule 38, Pars. 1 and 7, of the Rules of this Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The case to be reviewed is based on a complaint by the respondent in the United States District Court for the Northern District of Illinois, Eastern Division, charging infringement by your petitioner of respondent's patent on a tablet (specifically a salt tablet) depositing machine No. 2,060,645, granted to the Scientific Tablet Company (R. 70), assigned June 30, 1938, to respondent (R. 2).

Your petitioner filed an answer denying validity of the patent and infringement (R. 4). Said answer was amended (Par. 4a, R. 8-10) to present the defense that the respondent and its predecessor in title employed the patent in suit, contrary to law, to establish and maintain for itself a limited monopoly in the unpatented tablets (specifically salt tablets) to be deposited by the tablet depositing machine of the patent in suit, and that therefore it should be denied aid by a court in equity to enforce its rights under the patent laws.

The business of respondent's predecessor and of respondent, who acquired and continued that business, was

and is the manufacture and sale of salt tablets to canners. The salt tablet depositing machine of the patent in suit was leased to canners with a license in writing to use the machine of the patent in suit and a patented process involved in that use, *on condition that the salt tablets should be bought exclusively from respondent's predecessor, and afterwards from respondent* (R. 13; Defendant's Exhibits No. 1 and No. 2, R. 31, 34).

A Motion for Summary Judgment in accord with Rule 56 of the Rules of Civil Procedure for the District Courts of the United States (R. 53), based upon its amendment to its answer, and on depositions, exhibits and affidavits filed by your petitioner, and affidavits filed by respondent (R. 50, 51), was granted by Judge William H. Holly, who filed a memorandum (R. 56), and entered a final decree dismissing the complaint (R. 64). Said decree was based on his Findings of Fact and Conclusions of Law (R. 61 and 62).

The District Court's Findings of Fact were adopted from Findings common to those presented by both petitioner and respondent (R. 61). They are summarized as follows:

The business of respondent here involved is the manufacture and sale of salt tablets of predetermined weight for use in the canning industry. *The end and aim of that business is the sale of salt tablets in which the profits lie. The salt tablets are not patented.*

Respondent makes salt tablet depositing machines under the patent in suit and other patents. *Said salt tablet depositing machines,* however, *including that of the patent in suit,* are merely *secondary adjuncts to the business*—namely the sale of salt tablets (R. 28). Respondent leased said machines in writing including a license to use

the machine and also a patented process involved in that use, upon the specified condition and agreement by the lessee that respondent's unpatented salt tablets be used exclusively in said patented leased machine, specifically the depositing machine of the patent in suit (R. 31, 34).

Two hundred salt tablet depositing machines of the patent in suit were in use under the said leases. Two hundred lessee-licensee-canners using said salt tablet depositing machines of the patent in suit were bound by written agreement to buy the salt tablets to be deposited by said machines from the respondent exclusively (R. 28).

Your petitioner is in the business of mining, processing and selling salt, including salt tablets, to the canning industry. It also makes and leases unpatented salt tablet depositing machines to the canning industry, and particularly the accused machine in the instant case. Its machines bear a tag: "Morton Salt Tablet Dispenser for Use with Morton Salt Tablets Only."

The final finding of the District Court is:

> 7. "There is no genuine issue as to any material fact involved in this case" (R. 62).

Such finding was submitted by your petitioner (R. 59, Finding 11) and by respondent (R. 61, Finding 6).

The District Court's conclusion of law was:

"1. The plaintiff has attempted by the manner in which it carried on its business under the patent in suit to extend its patent monopoly beyond the boundaries described in the claims of said patent to cover unpatented products not included therein. Plaintiff, by its patent in suit, has attempted to establish a limited monopoly in the sale of unpatented salt tablets in the canning industry. This is condemned under the law." (R. 62.)

The Circuit Court of Appeals of the Seventh Circuit reversed the lower court, saying: "Due to the District Court's entry of its decree in a summary proceeding, we are not able to determine the monopolistic extent of plaintiff's contract. The court was clearly in error in granting this summary judgment without an inquiry into the facts. Unless the defendant can make 'a definite factual showing of illegality' arising from plaintiff's agreement with its licensee, it was not entitled to judgment of dismissal." (R. 130.)

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347).

2. The matter to be reviewed arises in a suit under the Patent Laws of the United States, Judicial Code, Sec. 24(7) (28 U. S. C., Secs. 41-7).

3. The question involved is one of law to be determined under said Patent Laws and was raised on a Motion by your petitioner for Summary Judgment (R. 53) under Rule 56 of the Federal Rules of Civil Procedure.

QUESTIONS PRESENTED.

The decision of the Circuit Court of Appeals for the Seventh Circuit presents the following questions:

1. Was it necessary for your petitioner to give evidence to show the "monopolistic extent of the" restraint of the trade in salt tablets resulting from "plaintiff's (respondent's) contract" to justify the decree of the District Court?

2. Was the District Court in error in granting summary judgment without further inquiry into the facts to determine whether plaintiff (respondent) had actually

established an illegal monopoly in the manufacture and sale of salt tablets?

3. Was it requisite for defendant (petitioner) to make "a definite factual showing of illegality" arising from plaintiff's (respondent's) agreement with its licensee to be entitled to judgment of dismissal?

4. Does not the defense set up by petitioner (4a, R. 8-10) arise from the patent laws and from respondent's attempt to extend its patent monopoly to unpatented articles not covered by said patent, but used in said patented article?

REASONS FOR GRANTING THE WRIT.

The exercise of judicial discretion in favor of granting a writ of certiorari in this case is based upon the following reasons:

1. The decision of the Circuit Court of Appeals of the Seventh Circuit is in obvious conflict with decisions of this Court upon the same matter;

2. The decision of the said Circuit Court of Appeals is in obvious conflict with decisions of other Circuit Courts of Appeal on the same matter; and

3. The decision of the said Circuit Court of Appeals is in obvious conflict with an earlier decision of its own on the same matter and from which it attempted to differentiate the instant case.

For the aforesaid reasons, it is urged that this petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

CLARENCE E. MEHLHOPE,
Counsel for Petitioner.

Chicago, Illinois,
April 10, 1941.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The Memorandum of the United States District Court for the Northern District of Illinois was filed January 31, 1940 (R. 56). It is reported in 31 Fed. Supp. 876. Its Findings of Fact and Conclusions of Law appear in the Record at pages 61, 62.

The opinion of the Circuit Court of Appeals of the Seventh Circuit was filed January 14, 1941. It was reported in 48 U. S. P. Q., 277. The petition for rehearing was denied March 11, 1941 (R. 157), which is the date of the decree to be reviewed.

JURISDICTION.

See petition (p. 5, *ante*).

MATTER INVOLVED.

The material facts of the case, as to which there is no genuine issue, appear in the petition (p. 2, *ante*). The matter for determination by this court is a question of law only.

SPECIFICATION OF ERRORS IN THE COURT BELOW.

The errors which petitioner will urge if the writ of certiorari is issued, are that the Court of Appeals of the Seventh Circuit erred:

1. In holding that it is not the salt tablet as such but the salt which goes into the salt tablet which must de-

termine the monopolistic tendency of respondent's lease contracts.

2. In holding that the District Court was clearly in error in granting this summary judgment without a further inquiry into the facts.

3. In holding that unless the petitioner can make "a definite factual showing of illegality" arising from respondent's agreement with its licensee, it was not entitled to judgment of dismissal.

4. In not holding that the illegality lay in the patent license agreement itself.

5. In not holding that (a) the respondent's activities were beyond the domain of its patent; (b) that as a practical matter, respondent's exercise of its patent monopoly tended to result in a limited monopoly in an unpatented commodity, namely, salt tablets used in the canning industry; and (c) the respondent sought to derive its profits not from the invention itself but from the unpatented supplies, salt tablets used in the patented depositing machine.

6. In reversing the decree of the United States District Court, for the Northern District of Illinois, Eastern Division.

SUMMARY OF ARGUMENT.

The essential conclusion of law made of record by the District Court was:

> "1. The plaintiff *has attempted by the manner in which it carried on its business under the patent in suit* to *extend* its patent monopoly beyond the boundaries described in the claims of said patent *to cover unpatented products not included therein.* Plaintiff, by its patent in suit, has *attempted to establish a limited monopoly* in the sale of unpatented salt tablets in the canning industry. This is condemned under the law." (R. 62.)

This conclusion of law was made by the District Court notwithstanding plaintiff's contention that defendant (your petitioner) "is not entitled to judgment because plaintiff" (respondent) "*has not obtained and cannot obtain a complete monopoly on the sale of salt tablets through the restrictions imposed on the use of the patented machines.*" (R. 63.)

The Court of Appeals, however, sustained respondent's (plaintiff's) contention and held that the conclusion of law 1 of the District Court was error.

The argument in this brief will be devoted to showing that the District Court's conclusion of law on which its decree was based, was correct and in accord with the decisions of this Court and with the decisions of the Circuit Courts of Appeal of other Circuits. And that the endorsement by the Circuit Court of Appeals below of respondent's (plaintiff's) contention as stated above, with its reversal of the decree of the District Court based on that contention, is without sound legal precedent.

Even in cases arising under the Sherman Act, the fact that the party accused "has not obtained * * * a complete monopoly," has been held without determinative effect in a recent decision by this Court. *Fashion Originators' Guild of America, Inc., et al.*, v. *Federal Trade Commission,* (48 U. S. P. Q. 483, at 485). This Court said in that case:

> "Nor is it determinative in considering the policy of the Sherman Act that petitioners may not yet have achieved a complete monopoly. For 'it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.' *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16; *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 237. It was, in fact, one of the hopes of those who sponsored the Federal Trade Commission Act that its effect might be prophylactic and that through it attempts to bring about complete monopolization of an industry might be stopped in their incipiency."

ARGUMENT.

No further "inquiry into the facts" required.

THE FACTS AS TO WHICH THERE IS NO GENUINE ISSUE WERE NOT DISCUSSED OR EVALUATED IN THE OPINION OF THE COURT OF APPEALS BELOW. SAID FACTS FULLY SUPPORT THE DECREE OF THE DISTRICT COURT.

The opinion states (R. 130) that "Due to the District Court's entry of its decree in a summary proceeding" * * * it is "not able to determine the monopolistic extent of plaintiff's contract"; that "the Court was clearly in error in granting this summary judgment without an *inquiry* into the facts"; and that "unless the defendant can make 'a definite factual showing of illegality' *arising from plaintiff's agreement with its* licensee(s), it was not entitled to judgment of dismissal."

In substance, the above statement is that, without *additional evidence* to show illegality *arising from respondent's (plaintiff's) lease-license agreements*, the decree below was error.

The Court of Appeals below has obviously nullified its own earlier decision in the *American Lecithin Co.* v. *The Warfield Co.*, 105 Fed. (2d) 207, at 212; 42 U. S. P. Q., 180, at 185, which it has failed to properly apply to *those facts* in this case, *as to which there is no genuine issue* and which are substantially on all fours with the material facts in the Lecithin case. *Evidence of no additional facts is required.* And there is no *"factual issue"* in the case to bar "the granting of a summary judgment."

Note: Emphasis ours throughout Brief.

Small field in which respondent has exercised its patent monopoly in attempt to create a limited monopoly in unpatented salt tablets supplied to canners.

The Circuit Court of Appeals below found that (R. 129, (4)):

> "The volume of all the salt business is large. The amount used in the canning field is so small that its complete control would not result in a monopoly of the salt industry. It is not the salt tablet as such, but the salt which goes into the salt tablet which must determine the monopolistic tendency of plaintiff's lease contracts."

This is immaterial.

The unpatented product involved in this case is a *salt tablet* of predetermined content. It is used in a small part of the canning field, in which are also used both loose salt and salt brine. The salt industry is manifestly outside of any consideration to be had by the Court in this case. And equally without relevancy is the extent of the so much smaller canning industry, large as it may be.

The patent in suit relates to a machine for depositing *salt tablets* in cans in commercial canning of tomatoes and the like. The business of respondent's predecessor was the manufacture and sale of salt tablets to commercial canners. Said business was acquired some six months before the bill was filed, and was carried on by respondent under the lease-license agreements theretofore entered into by its predecessor.

Rule of the Lecithin case.

Quoting the Lecithin case, the opinion of the Court of Appeals in the instant case says:

> "Stated in another way, the underlying question in each case is directed to whether (a) the patentee's

activities are within or beyond his domain. In determining when courts will interfere with the patentee's powers to sue infringers (contributory or otherwise) it is necessary to take into consideration whether (b) as a practical matter, the exercise of the patent monopoly will result in a limited monopoly in an unpatented commodity, and (c) whether the patentee seeks to derive his profits not from the invention itself but from the unpatented supplies used in the invention."

Adopting this statement of the rule as controlling in the Seventh Circuit and applying it to the present case the question is whether:

(a) The respondent's activities in the manufacture and sale of salt tablets to the canning industry are beyond his domain; whether

(b) As a practical matter, the exercise of the patent monopoly will result in a limited monopoly in an unpatented commodity, (salt tablets); and whether

(c) The respondent seeks to derive its profits not from the invention itself but from the unpatented supplies (salt tablets) used in the invention, namely, the depositing machine.

Extent of the legal patent monopoly.

As stated in the opinion of the Court of Appeals below (R. 127):

"A patent, in itself, is a monopoly—a legal monopoly. The limits of that monopoly are prescribed (and fixed) by the statute. They are to make, to sell, and to use the patented product or process for a period of seventeen years. The patent grant does not, however, extend to control of the making, the selling, or the use of an unpatented article which may be the product of the patented process . . . product, or which may be necessarily used by the licensee of the patented machine or product.

• • • • •

> "It is because a patentee has a leverage, a coercive argument, through the ownership of an important patent, the use of which he may grant or withhold from a customer, that his position becomes one fraught with dangerous monopolistic possibilities. *The temptation to use his legal patent monopoly so as to dominate a field beyond the legitimate coverage of his patent is great.* For this reason the close scrutiny of patent license agreements is quite needful."

Accepting the above definition of the "Extent of the Legal Patent Monopoly" as sound, we now take the "Rule of the Lecithin Case" and apply it to those facts in this case as to which there is no genuine issue.

(a) The respondent's activities in the case at bar are beyond its patent's domain.

The respondent's activities are directed to the exclusive sale of unpatented *salt tablets* to the canning industry for use in the salt tablet depositing machines of the patent in suit, which are leased and licensed to be used under a written agreement by the lessee to use none other than salt tablets purchased from plaintiff exclusively.

Respondent in this case has *succumbed to the "temptation to use its legal patent monopoly to dominate a field beyond the legitimate coverage of its patent"*, namely, the limited field in the canning industry where *salt tablets* are used instead of loose or bulk salt or salt brine.

And it is futile for respondent to contend as it did below (opinion, R. 129 (3)), that its lessees are permitted to purchase and use other depositing machines. If the purchase of another machine is contemplated, respondent's lessee-licensee is confronted at once with a suit for infringement by his lessor-licensor. In such suit, he would be estopped to deny the validity of the patent on his

licensed machine, and would be presented with a doubtful legal determination as to the question of infringement by the machine purchased. Again, there is the matter of in-infringement of his lessor's *process* patent (1,887,073, R. 103), also included in the lease-license agreement. (Defendant's Exhibit No. 1; R. 31, 32.) The validity of this patent he is likewise estopped to deny. And as to the question of infringement thereof, as plaintiff will not dispute, he is concluded, whatever machine he purchases, not having its origin in the plaintiff, and whatever salt tablets for use therein he purchases from others than the plaintiff.

The *Federal Trade Commission* v. *Sinclair Refining Company* case, 261 U. S. 463; 67 L. Ed. 746, has absolutely no significance or bearing upon the facts in this case. *There is nothing indicating the use of a patent to dominate or control an unpatented article* beyond the legal domain of said patent, in that case.

And it may be noted here that the opinion of the Court of Appeals below has given no consideration whatever to respondent's letters to the trade directing particular attention to the close relation of patents on the depositing machines, including that of the patent in suit; the process patent; and how the use of either the machine or the process was *limited to the use of salt tablets bought exclusively from plaintiff's predecessor.* (See Defendant's Exhibits 3, 4 and 5, R. 37-41; and Defendant's Exhibit 8, R. 45, 46.)

It is manifest that the respondent's activities under its patent in this case come squarely within clause (a) of the rule announced in the Lecithin case.

(b) As a practical matter, the exercise of the patent monopoly will result in a limited monopoly in an unpatented commodity, salt tablets used in the canning industry.

As estimated by respondent (R. 28; Qs. 44, 45), machines made under the patent in suit were under one or the other forms of its lease-license agreement in use by two hundred lessee-licensees at the time of the depositions of Suppiger and Schofield. This significant fact "as to which there is no genuine issue" is not mentioned in the opinion of the Court below. *Yet each and all of the lessee-licensees of these machines were bound by the lease-license agreement to buy all the salt tablets used in said machines from the plaintiff exclusively.* Thus, as a practical matter, the exercise of plaintiff's monopoly under the patent in suit resulted in a substantial lessening of competition or tendency to create a monopoly in the sale of the unpatented *salt-tablets,* so far as the lessee-licensees of the two hundred leased machines made under the patent in suit are concerned. This is certainly a limited monopoly in the field of use of salt tablets in the canning industry. And said monopoly would be extended to include each lessee-licensee added to the said two hundred by a continuance of plaintiff's aforesaid activities under its patent in suit.

It appears manifest that the exercise of the respondent's patent monopoly has resulted in a limited monopoly in an unpatented commodity—salt tablets used in the canning industry.

(c) The respondent seeks to derive its profits, not from the invention itself but from the unpatented supplies (salt tablets) used in the invention, namely, the depositing machine.

The undenied evidence in the record is that the profits of the business lie in the sale of the salt tablets. Plaintiff's attorney, when the depositions of Suppiger and Schofield were taken, asked no questions of them to explain or detract from their free admission of that fact. And their affidavits filed shortly before the hearing did not suggest that the nominal rentals of the patented depositing machines included a profit. (R. 50, 51.)

The first intimation of profits on machine rentals in the salt tablet business of respondent and its predecessor was presented in the Court of Appeals below. In these circumstances that Court should have given no credence to respondent's *argument* repeated in the opinion (R. 130 (6)), that *any profit* was included in said rentals.

Finding of fact 4 by the District Court (R. 62) includes *material facts* involved in the case as to which "there is no genuine issue"; and particularly the fact that "The end and aim of the business was and is the *sale of the salt tablets in which its profits lie. The patented depositing machine* of the patent in suit is a mere secondary adjunct." (See R. 21, Q. 102, 103; R. 28, Q. 50.)

This Court must concede that in the instant case, (c) *The patentee seeks to derive his profits, not from the invention itself but from the unpatented supplies (salt tablets) used in the invention,* namely, the depositing machine of the patent in suit. *There is no genuine issue as to this fact, which is freely admitted by respondent's executive officers.* (R. 21, Q. 102, 103; R. 28, Q. 50-52.)

But this appears to have been ignored in the opinion of the Court of Appeals below.

From the foregoing, it is manifest that *the facts in the instant case, as to which there is no genuine issue, fully support the decree of the District Court.*

Authorities.

As we have shown above, the facts in the instant case are substantially on all fours with the Lecithin case on which defendant's motion was based. Neither the Lecithin case nor those which it followed, namely, the Carbice case (*Carbice Corporation of America* v. *American Patents Development Corp.*, 283 U. S. 27; 51 S. Ct. 334), and the Leitch case (*Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458, 463; 58 S. Ct. 288, 290), depend upon the Sherman Anti-Trust Act or upon the Clayton Act. They are each founded on the principle announced by the Supreme Court in the Carbice case that a patentee "*may not exact as the condition of a license that unpatented materials used in connection with the invention shall be purchased only from the licensor:* * * * to permit the patent owner to 'derive its profit, not from the invention on which the law gives it a monopoly, but from the unpatented supplies with which it is used' is 'wholly without the scope of the patent monopoly.' * * * *If a monopoly could be so expanded,* the owner * * * of *a patent for a machine might thereby secure a partial monopoly on the unpatented supplies consumed in its operation.*" (51 S. Ct. 334, at 335; 283 U. S. 27, at 32.)

In neither the Lecithin case nor the Carbice and Leitch cases does it appear that the Court has found that *an actual illegal monopoly had been established.* Certainly, in the Carbice case the Court required no inquiry as to

the facts to determine whether the amount of solid carbon dioxide used in the patented "transportation package" was large enough to result in an illegal monopoly of the solid carbon dioxide industry. And in the Leitch case the Court required no inquiry as to the facts to determine whether the amount of bituminous emulsion used in the patented process was large enough to result in an illegal monopoly of the bituminous emulsion industry.

The Standard Oil case (*Standard Oil Company* v. *U. S.*, 283 U. S. 163; 51 S. Ct. 421), upon which the opinion of Court of Appeals below is based, has no application to the instant case. That case related to cross-license agreements under oil cracking process and apparatus patents. The Supreme Court, after finding nothing illegal in the cross-license agreements *per se*, stated, as quoted by Judge Evans, (opinion p. 5; 51 S. Ct. 421, pp. 425, 426; 283 U. S. 175):

> "But an agreement for cross-li[illegible]ing and division of royalties violates the Act only [illegible]n used to *effect* a monopoly, or to fix prices, or [illegible]pose otherwise an unreasonable restraint upon i[illegible]tate commerce." Citing *Bement* v. *National Harro[illegible] Co.*, 186 U. S. 70. * * * *United States* v. *General Electric Co.*, 272 U. S. 476 * * * and others.

Thereupon, the Court found it necessary "to examine the evidence to ascertain the operation and effect of the challenged contracts." As a result, the Court found that there was no unreasonable monopoly or restriction of competition and dismissed the bill.

The Standard Oil case thus differs from the Carbice and Leitch cases in that in the Standard Oil case there was no illegality in the cross-licensing agreements directly restraining an article of commerce, whereas in both the Carbice and Leitch cases as well as in the

Lecithin case and the case at bar, there was *an illegal direct restraint of an unpatented article of commerce, either express or implied.* And *these restrictions were tied to a patent monopoly which did not include or cover such articles of commerce,* but *which the patentee attempted to monopolize under his patent, as in the case at bar.*

REASONS FOR GRANTING THE WRIT.

The Motion for Summary Judgment in the instant case was based on *American Lecithin Co.* v. *The Warfield Co.,* 105 Fed. (2d) 207 (see p. 11, *ante*).

Petitions for writs of certiorari by each party to that case were denied. (308 U. S. 609; 60 S. Ct. 171. 308 U. S. 609; 60 S. Ct. 175.)

The Lecithin case later was referred to with approval in the case of *Ethyl Gasoline Corporation* v. *United States,* 60 S. Ct. 618, at 626; 309 U. S. 436, at 459.

The facts in the instant case were substantially on all fours with the facts in the Lecithin case which followed the Carbice case and the Leitch case in this court (p. 11, *ante*). In neither of these cases did the court find that an actual illegal monopoly had been established by the patentee's acts.

Philad Co. v. *Lechler Laboratories, Inc.,* 107 Fed. (2d) 747, was a case decided by the Circuit Court of Appeals of the Second Circuit. That Court also followed the Supreme Court cases followed by the Lecithin case.

The recent case of *B. B. Chemical Co.* v. *Ellis* (48 USPQ, 487) was a case decided by the Circuit Court of Appeals of the First Circuit. That Court also followed the Supreme Court cases followed by the Lecithin case.

In neither of the above cases, either in the Supreme Court or in the Courts of Appeal of the First or Second Circuits, or in the Lecithin case in the Seventh Circuit, does it appear that the Court had required evidence that an actual illegal monopoly had been established in the articles over which the patentee attempted to extend his patent.

Thus, the sole exception to the general trend of authority is to be found in the decision of the Circuit Court of Appeals of the Seventh Circuit in the instant case.

The writ should be granted so that the question of law in the instant case may be properly determined in accord with the rule as decided by this Court and as followed by other Circuit Courts of Appeal.

CONCLUSION.

For the reasons above stated it is urged that the petition for writ of certiorari be granted.

Respectfully submitted,

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April 10th, 1941.